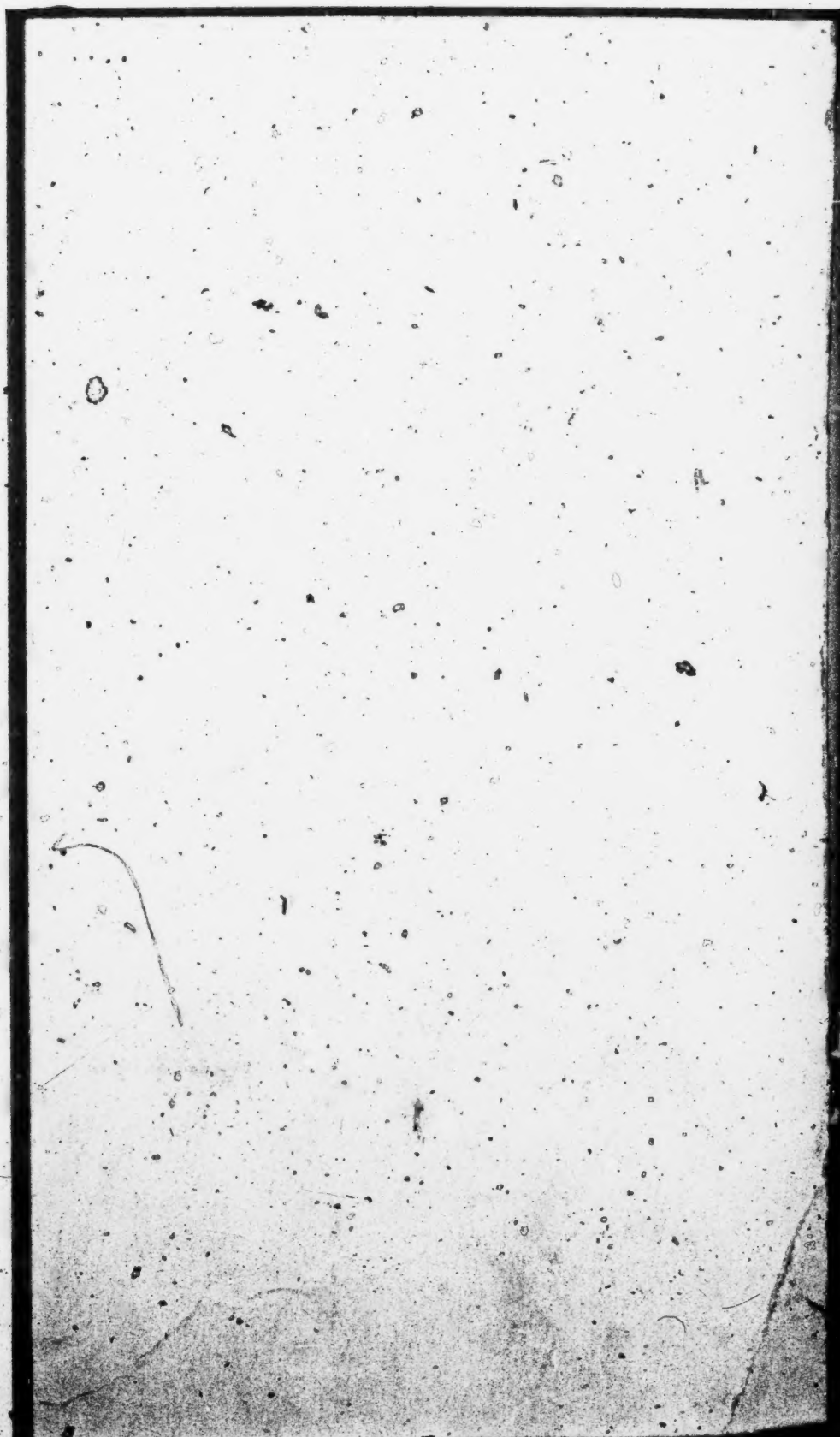

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 411.

THE GALVESTON WHARF COMPANY ET AL., *Petitioners*,

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents*.

SUPPLEMENTAL BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY IN REPLY TO BRIEF OF MALLORY STEAMSHIP CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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May it please the Court:

Respondent, Mallory Steamship Co., has taxed this respondent with having, in its brief, incorrectly stated the record in several respects. This respondent respectfully submits that the error lies with the Mallory Steamship Co. and not with it.

Alleged Error One.

The lease agreement between Mallory Steamship Co. and Galveston Wharf Co. is set out in full as an exhibit in the record and speaks for itself (R. Ex. 81).

It is again submitted that this is but a simple lease for the exclusive benefit of the Mallory Steamship Co. and its affiliated lines reserving to the lessor only the right to allow others the use of any portion of the wharf not actually being used by the Mallory. That the Mallory allowed employers of the rail lines and of the Wharf Co. to work on the wharf no more affects the exclusiveness of the Mallory's possession than would the presence of guests in a hotel being operated under a lease similar to that here involved affect the possession of the hotel company.

Alleged Error Two.

Counsel for the Mallory has failed to distinguish between the handling of carload shipments and the handling of less than carload shipments. The latter were handled in the same manner as described in *Pratt v. Railway Co.*, 95 U. S. 43, that is to say, there was a separate marked and invariable location on the wharf where such shipments were placed for each of the rail lines entering Galveston. This is shown by the drawing of the wharf (R. Ex. 80L) identified and explained by the superintendent of the Mallory (R. 46). Carload lots, on the contrary were not placed on any portion of the wharf reserved separately for the various rail lines but, as stated by the Mallory's own superintendent:

"As to who designates the place on carload shipments, it is understood and agreed that they be discharged opposite the part of the ship where they are stowed. A shipment stowed in the forward end of the ship is discharged opposite the forward end and shipments in the aft end are discharged opposite the aft end. There is a division line, and we do not go forward of that division line with the forward end and aft end (*sic*) with freight." (R. 43.)

An examination of the sketch above referred to (R. Ex. 80L) shows the location of this and other carload shipments on the wharf on the right of the fire and shows conclusively that in no case were carloads placed in the space regularly allotted to the various railroads for the less than carload freight.

In reading the testimony quoted on pages 5-8 of respondent Mallory's brief confusion will be avoided by bearing in mind that the place on the wharf "designated" for less than carload shipments was fixed and did not change with the arrival of goods from different vessels while the place "designated" for carload shipments (such as is here involved) varied with each vessel according to where the shipment was stowed. The place for unloading such shipments was not "designated" until the arrival of the vessel. This, of course, presents an entirely different situation from that existing in *Pratt v. Railway Co., supra.*

Alleged Error Three.

On page 8 of his brief counsel for respondent Mallory states that a joint check of the goods was not made at the time the goods were lifted from the floor to be loaded into the cars. The only positive testimony on the point is by the Mallory's chief clerk

who said that "whenever the Galveston Wharf Co. gets ready to pick up a carload at Pier No. 24 and put it on a car, they take a copy of the billing, *accompanied by a clerk of the Mallory,* and check those carload lots as *they* pick them up and take them over to the car." (R. 55) Counsel for respondent Mallory infer from some other testimony of this witness that he did not mean what he thus stated directly as a fact. The Supreme Court of Texas evidently understood him to mean what he said, as this very testimony was quoted in the opinion (R. 154) as the basis of one of its reasons for finding no delivery had been made to the railroad. It is also true that the goods were sometimes checked inside of the cars but it is difficult to see how this has any bearing on whether the check was joint or not.

On page 9 of respondent Mallory's brief exception is taken to the statement in this respondents' brief that receipts for goods were issued "as of the date and hour" of picking up the shipment. The basis for the statement contained in this petitioner's brief is the testimony of the Mallory's superintendent who said:

> "It is a fact that when the Galveston Wharf Company picked up carload shipments to be taken by it and loaded on the cars of the railroad, the Wharf Company would give a receipt to the Mallory Line *as of the date and time* they picked the freight up off the wharf on Pier No. 24 to take over to the cars." (R. 49)

In any event the point is not material since it is undisputed that the receipts were always given as of the *date* of loading into the cars and not as of the

date of discharge on the wharf and that had the fire not occurred the receipt for these goods *would have been dated the day after the fire.*

The matter of checking is not "unimportant" as asserted, but on the contrary most important because it was the only possible way of learning what the Mallory was delivering and in addition the uniform practice acquiesced in by all parties for years sheds a great deal of light on the general understanding of *all* as to when delivery was effective.

Errors in Brief of Mallory S. S. Co.

(1) In section I, page 26, of the Mallory S. S. Company's brief it is stated that that company's superintendent testified with reference to diversion *only*: "We would have endeavored to have a diversion." This entirely omits this gentleman's statement in the next two sentences of the record that:

> "*We would have reconsigned it* for the accommodation of the consignee. *After the goods had actually been loaded in the freight cars,* and we had received the diversion or reconsignment order, *the shipment would have been beyond our control.*" (R. 47)

Of course it is correct that if the billing had gone to the railroad at the time the order had been received the billing would have to be gotten from the railroad, but its delivery could not have been legally refused. According to the same witness of the Mallory above quoted, in amplifying his description of the procedure, whether or not the Mallory would get the billing and effect the diversion depended "on whether or not the Wharf Company has functioned in the meantime

[*i. e.*, between receipt of the order and request for the billing].'' (R. 49)

(2) It is stated (p. 27) that the Mallory simply paid part of the policing of the goods because it had other goods on the wharf in which the Wharf Company was not interested. In support of this statement the provision of the lease requiring the Mallory to ''pay the salaries of sufficient police watchmen to protect the property hereinabove described and also to pay its pro rata of the expense of one day and one night police sergeant'' is quoted.

The police sergeant referred to was in charge of all the wharf police watchmen on the entire waterfront and the pro rata provision had nothing to do with other goods on the Mallory wharf but was put into the lease because the sergeant served many other steamship companies while the police watchmen on the docks of the Mallory, whose full salaries were paid by the Mallory, served that company alone.

(3) This respondent denies that any loaded cars were burned as stated on page 28 of the brief and further asserts that the Mallory did not undertake the salvage of anything belonging or appertaining to this or any other railroad. If, as asserted by the Mallory, the salvage was undertaken, not on its own behalf but on behalf of someone else and only because ''some one should undertake the salvage'' the salvage realized from these goods would have been tendered into court and not retained by the Mallory as was actually done.

In closing we respectfully call the court's attention to the fact that all the cases cited and discussed under ''Second Point'' (p. 19 *et seq.*) of respondent Mallory's brief deal with the transfer of shipments

under circumstances showing an agreement, express or implied from a course of conduct, that a deposit of goods at a certain place would constitute delivery which is not the situation here. Certainly there was no express agreement and the only implied agreement which can be inferred from the conduct of the parties both before and after the fire is that delivery was made at the time the goods were picked and loaded into the cars.

Respectfully submitted,

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